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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioners,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents.*

No. 703

FEDERAL MARITIME BOARD, *Petitioner,*

v.

UNITED STATES OF AMERICA and ISBRANDTSEN COMPANY, INC., *Respondents.*

BRIEF IN OPPOSITION BY RESPONDENT ISBRANDTSEN COMPANY, INC., TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX

	Page
Opinion Below	1
Jurisdictional Statement	2
Statutes Involved	2
Counterstatement of the Case	2
A. Proceedings Before the Federal Maritime Board	2
B. Proceedings in the Court of Appeals	5
Questions Presented	6
Argument	7
Introduction	7
I. The Court of Appeals Correctly Held That the Shipping Act Requires Prior Board Approval of the Exclusive Patronage System	8
II. The Decision Below Is Neither Novel Nor Conflicting	15
III. The Court of Appeals Had Jurisdiction to Set Aside the Board Order	18
IV. Certiorari Should Not Be Granted at This Stage Because Proceedings Are Pending Before the Board	23
Conclusion	23

Table of Authorities

Cases:

Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487 (E. D. Va., 1935)	21
Algonquin Gas Transmission Co. v. F. P. C., 201 F. 2d 334 (C. A. 1st, 1953)	20
American Surety Co. v. Bethlehem National Bank, 314 U. S. 314	16
Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327	20
Braniff Airways v. Civil Aeronautics Board, 147 F. 2d 152 (D. C. Cir. 1945)	20

Page

Civil Aeronautics Board v. Summerfield, 74 S. Ct. 350, 354 15
Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541, 546 20
Columbia Broadcasting System v. United States, 316 U. S. 407 19
Columbia Broadcasting System v. F. C. C., — F. 2d — (D. C. Cir., March 11, 1954) 22
Eden Mining Company v. Bluefields Fruit & S. S. Co., 1 U.S.S.B. 41 (1922) 16
Far East Conference v. United States, 342 U. S. 570 17
Hudson River Day Line v. United States, 85 F. Supp. 225 (S. D. N. Y. 1949) 20
Isbrandtsen v. United States, 96 F. Supp. 883, 888 (S. D. N. Y. 1951), aff'd. 342 U. S. 950 ..... 4, 7, 10, 11, 16, 23
Isbrandtsen v. United States, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed, sub, nom. A/SJ Ludwig Mowinckels Rederi v. Isbrandtsen Co., Inc., 336 U. S. 941 ..... 9, 15, 18, 19
Isbrandtsen-Moller Co. v. United States, 300 U. S. 139 16
Japan-Atlantic and Gulf Freight Conference, et al. v. United States, et al., No. 718, October Term, 1952 14
Koshland v. Helvering, 298 U. S. 441, 447 17
Myers v. Bethlehem, 303 U. S. 41 21
Petroleum Co. v. Comm'n, 304 U. S. 209 21
Rawleigh v. Stoomvart, 1 U. S. S. B. 285, 290 (1933) 16
Seaboard and Western Airlines v. Civil Aeronautics Board, 181 F. 2d 515 (D. C. Cir., 1949) 22
S. S. W. Inc. v. Air Transport Association, 191 F. 2d 658 (D. C. Cir., 1951) 17
Swayne and Hoyt v. United States, 300 U. S. 297 ... 10
United States v. Far East Conference, 342 U. S. 570 4
United States v. Sullivan, 332 U. S. 689 9
United States v. Borden Co., 308 U. S. 188 9
United States v. Los Angeles R.R., 273 U. S. 291 ... 21
U. S. Navigation Co. v. Cunard S. S. Co., 50 F. 2d 83 (C. A. 2, 1931), aff'd. 284 U. S. 474 15
United States Navigation Co. v. Cunard S. S. Co., 284 U. S. 474 ..... 17, 18, 21

STATUTES:

Civil Aeronautics Act — Page

49 U.S.C. § 492 11
49 U.S.C. § 494 11

Hobbs Act

5 U.S.C. 1032 ..... 2, 18, 21
5 U.S.C. 1034 22
5 U.S.C. 1037 5

Shipping Act, 1916, 46 U.S.C. 801 et seq.

§ 15, 46 U.S.C. § 814 ..... 2, 3, 6, 8
§ 22, 46 U.S.C. § 821 ..... 17, 21
§ 31, 46 U.S.C. § 830 18

MISCELLANEOUS:

Agreement Establishing Air Cargo, Inc., 5 CAB 468, (1948) 11
Contract Rates North Atlantic Continental Freight Conference (January 6, 1954) 12, 13, 16, 17
Contract Routing Restrictions, 2 U. S. M. C. 220, 226-227 (1939) 16
Federal Maritime Board—General Order 76, 46 Code Fed. Regs. Part 236 (Cum. Supp. 1952) 3
Intercoastal Investigation, 1 U.S.S.B. 400, 452 (1935) 16
IATA Traffic Conference Resolution, 10 CAB 783 (1945) 11
Matter of Pacific Coast European Conference, 3 U.S. M.C. 11 (1949) 4
North Atlantic Continental Freight Conference, Docket 724, 4 F.M.B. 98 (1952) 4, 12, 13
Resolution of North Atlantic Traffic Conference, 6 CAB 845 (1946) 11
Jaffe, Primary Jurisdiction Reconsidered: The Anti-trust Laws, 102 P. L. Rev. 577 (1954) 17, 18
Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954) 17
Von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954) 17

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OPINION BELOW.

Petitioners, the Japan-Atlantic and Gulf Freight Conference and the Federal Maritime Board, have applied

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[1] This Brief in Opposition by Respondent Isbrandtsen Company, Inc., is addressed to the petitions for certiorari in both No. 700 and No. 703.

for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1954 (R. 261). The opinion of the Court of Appeals (R. 248) by Bazelon, J. (Prettyman, J., concurring; Fahy, J., dissenting) has not been reported.

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was entered on January 21, 1954 (R. 261). Both petitions for certiorari were filed on April 20, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and 5 U. S. C. § 1040.

STATUTES INVOLVED.

The statutes involved are the Shipping Act, 1916, as amended, 39 Stat. 728, 46 U. S. C. § 801, *et seq.*, specifically Section 15 of that Act, 46 U. S. C. § 814, and the Review Act of 1950, 64 Stat. 1129, 5 U. S. C. § 1031, *et seq.*, colloquially known as the Hobbs Act. The applicable statutes are reprinted in the Appendices to the Petitions.

COUNTERSTATEMENT OF THE CASE.

A. Proceedings Before the Federal Maritime Board.

Respondent, Isbrandtsen Company, Inc., is an American-flag carrier by water engaged in transporting freight east-bound from Japan, Korea, and Okinawa to ports on the Atlantic coast of the United States (R. 1). Isbrandtsen competes for cargo on this route with Petitioner, the Japan-Atlantic and Gulf Freight Conference (hereinafter Conference), a voluntary association of seventeen common carrier steamship lines, of which twelve are foreign flag lines and five United States registered lines (R. 2, 60-61). The constitutive agreement under which the Conference operates was first approved in 1934 by the United States Maritime Commission

(predecessor of the Board) under Section 15 of the Shipping Act, 1916, 46 U. S. C. § 814 (R. 222). This agreement, as amended, authorizes the member lines jointly to establish and maintain freight rates, applicable only to traffic transported in vessels owned, controlled, or operated by themselves (R. 223). The conference agreement, however, provides that "there shall be no undue preference or advantages nor unjust or unreasonable discrimination nor unfair practices" against any shipper (R. 225). It further prohibits Conference lines from giving "special rates or other special privileges or advantages not offered to all shippers shipping under similar conditions" (R. 226). The conference agreement as amended contains no express authorization to employ an exclusive patronage system. Isbrandtsen is not a party to the agreement and is not a member of the Conference.

On December 24, 1952, the Conference filed with the Board a statement, pursuant to Board General Order 76,[2]

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[2] General Order 76, 46 Code Fed. Regs. part 236 (Cum. Supp. 1952) provides in pertinent part:

"3. Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the effective date of this rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:

"(a) The amount of the spread or differential in terms of percentages or dollars and cents;

"(b) The effective date;

"(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) Copies of the form of all contracts pertaining thereto.

• • •

"6. All information filed pursuant to this rule shall be available for inspection by interested parties at the Regulation Office of the Board. A notice of the filing of the statement required under paragraphs 2 and 3 above will be published in the Federal Register as soon as practicable. Except as may be otherwise provided in cases arising under Paragraph 4 above, interested parties shall have twenty

proposing initiation of an exclusive patronage system[3] in the Japan-Atlantic trade commencing January 23, 1953 (R. 82). Under the proposed system, shippers refusing to contract in writing to employ Conference lines exclusively would be charged for the identical transportation service, tariffs 9½ percent higher than the tariffs charged shippers who executed exclusive patronage agreements (R. 3, 82). Shippers executing the agreement who thereafter patronized Isbrandtsen would be required to pay the Conference as liquidated damages a sum in the amount of fifty percent of the freight charge that would have been payable if such shipment had been made in a conference vessel (R. 137). Because, as the Court below observed (R. 251), "Isbrandtsen, carrying slightly less than one-third of the total volume of trade on the Japan-Atlantic route, is the only non-member line competing with the Conference vessels, the impact of this system upon Isbrandtsen is readily apparent."

Notice of filing of the Conference statement was published by the Board in the Federal Register on December 21, 1952 (R. 220). Thereafter, Isbrandtsen and the Attorney General[4] seasonably filed with the Board written state-

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(20)days after the date of such publication within which to submit written comments relating to the information filed with the Board pursuant to this rule. Said comments may include a statement of position with respect to approval, disapproval or modification, together with a request for hearing, should such a hearing be desired."

[3] The exclusive patronage system is variously referred to in the opinion below and in the Petitions as a "contract/non-contract" or as a "dual rate system".

[4] The Departments of Justice, Agriculture and Commerce have contended in various proceedings that the exclusive patronage system is illegal under the Shipping Laws and the Antitrust laws. Docket 648, *Matter of Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948); Docket 684, *Isbrandtsen* v. *North Atlantic Continental Freight Conference*, 3 F. M. B. 235 (1950), rev'd. *sub. nom Isbrandtsen* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951); *United States* v. *Far East Conference*, 342 U. S. 570; Docket 725, *North Atlantic Continental Freight Conference* (pending).

ments in which they challenged the legality under the Shipping Act of the proposed system, the adequacy of the supporting statement by the Conference, and the validity of the 9½ percent differential (R. 140, 215). Both requested a hearing and they asked the Board forthwith to postpone initiation of the system pending a hearing (R. 142, 215).

On January 21, 1953, the Board granted the motions of Isbrandtsen and the Attorney General for a hearing prior to approval but denied the motions to halt initiation of the system pending approval (R. 220). The Board thereby permitted the system to become effective within 48 hours.

B. Proceedings in the Court of Appeals.

On January 22, 1953, the day following entry of the foregoing order, Isbrandtsen filed a Petition for Review in the Court below (R. 1). The Petition alleged that the proposed system could not lawfully be effectuated under the Shipping Act without prior Board approval; that in approving agreements the Board was required by statute to make certain findings which could not properly be made without a hearing; and that initiation of the system pursuant to the Board order threatened Petitioner with exclusion from a trade in which it had been engaged for many years (R. 4-6). A temporary stay of the Board order was granted and on March 23, 1953, the Court of Appeals granted an interlocutory injunction staying so much of the Board order as purported to permit the institution of the exclusive patronage system (R. 239).[5] Petitions for certiorari by the Conference and the Board to review this decree were denied by this Court. 345 U. S. 975.

Thereafter the Secretary of Agriculture, one of the largest shippers in foreign commerce, intervened in opposition to the Board order (R. 243). The United States, a

[5] Nothing in this interlocutory injunction purported to interfere with the orderly progress of the Board's hearing which proceeded before an examiner while this review action was pending.

statutory defendant under 5 U. S. C. § 1037, likewise opposed the Board's order.

The interlocutory injunction was made permanent in the judgment entered on January 21, 1954 (R. 261). The Court set aside the Board order "so far as it allows the institution of the proposed exclusive patronage contract/non-contract dual rate system" prior to its approval, and the Conference was "enjoined from acting pursuant to said proposed exclusive patronage contract/non-contract dual rate system until and unless said system is approved" by the Board (*Ibid.*).

In an opinion by Bazelon, J., (Prettyman, J., concurring) the Court held

> "that the action of the Board in allowing the dual rate system agreement to go into effect prior to approval is a final order within the meaning of the judicial review statute, and that it is contrary to the specific requirement of § 15 of the Shipping Act making Board approval a necessary condition precedent to initiation of such an agreement" (R. 259).

Fahy, J., dissented on jurisdictional grounds (R. 259). He did not construe the Board order as final, and he stated that if effectuation of the system without Board approval were unlawful, equitable relief should be sought against the Conference in the District Court.

QUESTIONS PRESENTED.

1. Whether an agreement by a conference of common carriers by water to institute an exclusive patronage system may become operative in the absence of prior approval by the Federal Maritime Board under Section 15 of the Shipping Act, 46 U. S. C. § 814.

2. Whether, in the circumstances of this case, an order of the Federal Maritime Board permitting an exclusive patronage system to become effective prior to approval was reviewable by the Court of Appeals.

ARGUMENT.

Introduction.

This is not a rate case. The Board's order, itself, makes abundantly clear that there is involved only "the initiation of the proposed contract/non-contract rate *system*" (R. 8) (emphasis supplied throughout). Indeed, the proposed shippers contract which Isbrandtsen attacked before the Board, incorporates no specific rates at all (R. 136-139), but only the threat of a procedure pursuant to which an arbitrary differential will be applied between whatever particular rates the Conference may set in the future. Thus the case does not involve, as Petitioners imply, the validity or justification of particular rates on particular commodities set by the Conference in pursuance of their rate making authority under the basic conference agreement.

The question is not whether the Federal Maritime Board must accord prior approval to a proposal by the Japan-Atlantic Conference to charge $50 instead of $45 per ton for tuna fish. Rather, this case concerns a dramatic shift from a *standard* of rate-making that applies a single rate *uniformly* to all shippers receiving the same transportation service to a standard that applies dual rates *non-uniformly* to shippers receiving the same transportation service. The issue, therefore, is whether, consistently with Section 15 of the Shipping Act, the Conference can institute, *without prior Board approval,* a new *system,* a different *principle* of rate making, which the Board has "frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades". *Isbrandtsen* v. *United States,* 96 F. Supp. 883, 888 (S. D. N. Y. 1951), aff'd. 342 U. S. 950. Applying the "clear language of Section 15 of the Shipping Act" (R. 259) the Court of Appeals concluded that an exclusive patronage system cannot be made effective without prior Board sanction.

Petitioners seek to transmogrify this narrow ruling into a sweeping decision that "*all* rate revisions" and "*every* rate change proposed by a conference" require prior Board authorization (Conf. Pet. 13, 14; Bd. Pet. 24). As we shall show, there is not the slightest warrant for so construing the carefully drafted opinion of the Court below. The decision of the Court of Appeals is clearly correct; it involves merely the straightforward application of an unambiguous statutory provision; it is not unprecedented; and it presents no conflict with decisions of this Court or with the decisions in other circuits. Certiorari is, accordingly, not warranted in this case.

I. The Court of Appeals Correctly Held That the Shipping Act Requires Prior Board Approval of the Exclusive Patronage System.

1) *Section 15 Expressly Requires Prior Sanction.* The most striking thing about the Conference petition is the eloquent silence with which it treats the pertinent statutory provision. Section 15 of the Shipping Act, 46 U. S. C. § 814, requires "every common carrier" to file with the Board a copy of "every agreement" with another carrier or person (1) "fixing or regulating transportation rates or fares", or (2) "giving or receiving special rates, accommodations, or other special privileges or advantages"; or (3) "controlling, regulating, preventing, or destroying competition". Agreements are comprehensively defined to include "understandings, conferences and arrangements." Section 15 further provides:

> "*All agreements,* modifications, or cancellations made after the organization of the Board shall be lawful *only when and as long as approved by the* board, and *before approval* or after disapproval, it shall be unlawful to carry out in whole or in part, directly or indirectly any such agreement, modification, or cancellation."

It follows that an agreement establishing an exclusive patronage system—which relates to the regulation of rates,

which gives special rates or advantages, and which is designed to effect a boycott of non-conference lines thereby "destroying competition"—is lawful "only when * * * approved". The Court of Appeals correctly so held.[6]

2. *The Board Did Not Authorize the System in Approving the Organic Agreement in 1934.* The Petitioners maintain that "in approving the organic agreement, the Board regarded its approval as authorizing the establishment of a rate making machinery whereby the conference could establish rates, including contract/non-contract rates" (Bd. Pet. 19; Conf. Pet. 3-4). In other words, Petitioners contend that when the Board approved the constitutive conference agreement in 1934 (p. 3, *supra*), it thereby sanctioned use of a particular exclusive patronage system in 1954. The short answer is that the "organic agreement" (R. 222) contains no provision authorizing an exclusive patronage system.[7] As the Court of Appeals put it, the system "introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement" (R. 257).

The Board relies upon the provision in the organic agreement authorizing the "establishment, regulation and maintenance of agreed rates and charges" (Bd. Pet. 18; R. 223). But this general rate making power is qualified by a proviso in the agreement that forbids the conference to give "special rates or other special privileges or advantages not offered to all shippers shipping under similar condi-

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[6] The canon that plain meaning should be given effect, *United States* v. *Sullivan*, 332 U. S. 689, 693, is reinforced in this case because agreements approved by the Board pursuant to Section 15 are made exempt by that section from the antitrust laws, and such exemptions are strictly construed. *United States* v. *Borden Co.*, 308 U. S. 188, 201.

[7] Compare the North Atlantic Continental Freight Conference agreement in *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed 336 U. S. 941, which expressly provided that "The conference may provide specific contract and non-contract rates * * *." 81 F. Supp. at 545.

tions" (Bd. Pet. 19; R. 226). The Conference now proposes to charge different rates for the same transportation service to shippers identically situated, not on the basis of differences in cost, tonnage or shipments, but on the sole consideration that the shipper not patronize any non-conference carrier. The proposed system thereby manifestly accords a special privilege to some shippers in derogation of the conference agreement.[8] It follows that in approving the organic agreement the Board not only did not authorize the exclusive patronage system, but, indeed, explicitly outlawed the invidious discrimination implicit in the system.

There is yet another vice in the contention that approval of the basic conference agreement constituted approval of an exclusive patronage system. Such a system is invalid if the spread between the contract and non-contract rates is arbitrary.[9] It can scarcely be maintained that the Board approved a 9½ percent spread when it sanctioned the basic agreement in 1934, for at that time no one knew when, if ever, the Conference would undertake to institute a contract system or what, if any, spread between the dual rates it would undertake to employ. The Board first received notice of the spread in rates involved here when the Conference filed a statement pursuant to General Order 76 on December 24, 1952 (R. 82). The Board clearly could not have approved in 1934 a spread between rates not proposed or called to its attention until 20 years later.

Certainly the Board will scarcely be heard to say that when it approves a basic conference agreement it sanctions whatever practice the Conference may thereafter devise, however, discriminatory or arbitrary that practice may be. Such a view would constitute the height of admin-

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[8] This Court has characterized an identical exclusive patronage system as "prima facie discriminatory". *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 303.

[9] "Dual rate provisions which authorize arbitrary differentials are obviously not reasonable" and "provisions which permit such rates are invalid". *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), aff'd. 342 U. S. 950.

istrative irresponsibility—to be contrasted with the view of Commissioner Aitchison of the Interstate Commerce Commission that an administrative agency would "create an injustice * * * by omitting to inform itself and by acting ignorantly when intelligent action is possible". *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S. D. N. Y. 1951). And as the Civil Aeronautics Board has stated in construing analogous statutory provisions which confer an exemption from the antitrust laws to inter-carrier agreements approved by the CAB:[10]

> "Section 412(b) of the Civil Aeronautics Act requires that we shall approve specific agreements to accomplish such purposes only *after careful scrutiny to determine that the provisions of any such arrangement adequately protect the public interest involved.*" Agreement Establishing Air Cargo, Inc., 5 CAB 468, 469 (1948).

3. *Petitioners Distort the Ruling Below.* Petitioners seek to escape the "clear language" of Section 15 with a parade of imaginary horribles. Thus, the Board argues that the "reasoning of the Court below, carried to its *strictly logical* conclusion would seem to dictate the need for separate prior approval for *all* rates of conferences, as well as contract/non-contract rates" (Bd. Pet. 24). It complains that the decision below will "thrust upon the Board an intolerable

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[10] Section 412 of the Civil Aeronautics Act, 49 U. S. C. § 492, requires every carrier to file with the Board certain specified agreements. "The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter." Agreements so approved are exempt from the antitrust laws. 49 U. S. C. § 494. Construing these sections, the Board has accorded prior approval to agreements covering rates, forms of tickets, terms of carriage, and the like. See *Resolution of North Atlantic Traffic Conference*, 6 CAB 845 (1946); *IATA Traffic Conference Resolution*, 10 CAB 783 (1945).

burden of detail" and that the Board will be "overwhelmed" (Bd. Pet. 17, 23). The Conference likewise contends that the "import of the decision of the court below cannot be limited to contract/non-contract rate situations, for the theory of the decision is equally applicable to *all* rate revisions which may be proposed by a conference" (Conf. Pet. 13). The Board will be required, the Conference states, to "pass upon the thousands of proposals it receives each month" (*Id.* at 14).

These extravagant claims set up a strawman totally unwarranted by anything in the opinion of the Court below. That Court pointedly emphasized that an exclusive patronage system "can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new *scheme* of rate combination and discrimination * * *" (R. 257). The decision below applies not to "day-to-day rate fixing or routine activities by the conference" (Bd. Pet. 12),[11] but to what the Conference concedes to be the "most important competitive tool" employed by the conferences (Conf. Pet. 12). In sum, the Court below concluded only that the Shipping Act compels prior approval of an agreement among carriers to employ the exclusive patronage system and not of the specific rates promulgated thereafter pursuant to the agreement.

Data furnished by the Board in its petition exposes the fanciful character of the "intolerable burden" claims. According to the Board, there are only 105 conferences engaged in foreign commerce and of these 62 employ the exclusive patronage system (Bd. Pet. 21). This is a far cry from the "thousands of proposals" the Conference conjures up (Conf. Pet. 14). Indeed, in a calmer vein, the Conference itself recognizes that "*limiting the decision of the*

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[11] Compare the contrasting view that "so formal and complicated an agreement as is encompassed in conference adoption of a contract system" is clearly distinguishable from a mere "routine" rate change. Brief of Counsel for the Board, Docket 724, F. M. B. *North Atlantic Continental Freight Conference*, September 26, 1952, in which the Board forbade the initiation of the system prior to approval, *infra*, p. 13.

court below to the very facts presented in this case, it means that these freight conferences may not establish contract/non-contract tariffs unless and until proposals to establish the same have been specifically approved by the Board" (Conf. Pet. 11). It is hard to see how the Court of Appeals could have held any less without completely devitalizing the statutory mandate that such agreements "shall be lawful only when and as long as approved".

The Board does not deny that it must accord approval at some stage. Indeed, Board General Order 76 (fn. 2, *supra*) contemplates precisely such approval. Surely it is no more burdensome to approve the system before effectuation than after it has become operative. And because the system is admittedly monopolistic in purpose (p. 23, *infra*) prior approval is particularly imperative if the rights of competing carriers and shippers are not to be irreparably lost. As the Board itself observed in a more responsible moment in preventing the initiation of similar dual rates:

> "[T]he possibility of an arbitrary spread in the dual rates now proposed * * * is of such importance that the status quo of the Conference carriers with respect to dual rates should not be changed pending the completion of the investigation into this matter which we have instituted. For the carriers to put the dual rate system into effect prior to the completion of our inquiry would, in our judgment, operate to the detriment of the commerce of the United States." *Contract Rates, North Atlantic Continental Freight Conference, Docket* 724, 4 F. M. B. 98 (1952).

The Conference claims prior approval should not be required because it is "impractical for the conference to wait final determination by the Board" and that a "rate war has ensued" (Conf. Pet. 13). The record is barren of any reference to an ensuing rate war, and the wisdom of the rule against consideration of matters *dehors* the record is underscored by the Conference contention, which omits relevant particulars and is, therefore, misleading. The

facts—as shown in a "Motion for a Stay" of the lower court's interlocutory decree, filed by the Conference with this Court during the October Term, 1952 [12]—are that the Conference itself deliberately initiated a rate war in an effort to upset the *status quo* which the lower court's interlocutory injunction had sought to preserve. The rate war in this trade was not the result of a sudden "economic crisis" (Conf. Pet. 13); it was instead the end product of cumulative economic forces, including an oversupply of Conference vessels, excessively high conference rates, the postwar resurgence of the Japanese merchant marine, and secret rebates by Conference members.[13] The delay occasioned by Conference compliance with the administrative procedure established by Congress as a condition precedent to an exemption from the antitrust laws was incidental.

In substance, Petitioners are seeking to rewrite the statute. Even if tenable, the arguments that prior approval is "burdensome" and "impractical" have been advanced in the wrong forum. Congress has explicitly provided that such agreements shall be "lawful only when and as long as approved by the Board" and that "before approval * * * it shall be unlawful to carry out * * * any such agreement."

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[12] "Motion for a Stay of the Order Below", *Japan-Atlantic and Gulf Freight Conference, et al.* v. *United States, et al.*, No. 718, October Term, 1952. The motion for a stay was denied, and the Conference petition for certiorari was likewise subsequently denied. 345 U. S. 975.

[13] "The current situation in the Far East [*i.e.*, the 'freight rate warfare'] has been brought on primarily by an increase in the supply of ships, which in turn stemmed from the resurgence of the Japanese Merchant Marine and the postwar rebuilding program of the many foreign ship lines trading with Japan." N. Y. Journal of Commerce, April 23, 1953, cited "Motion for a Stay", *id.*, Exhibit F. The Conference lines lowered rates "to combat the inroads of non-conference, or independent lines, and to curb the tendencies of certain members toward such malpractices as secret rebates. . . . Some conference members ruefully admit that this action to open rates indefinitely 'has smoked out the fact that rates for shippers were far too high.'" N. Y. Journal of Commerce, March 25, 1953, *Id.*, Exhibit B.

Whether agreements shall be lawful absent prior approval is a "matter of policy for Congress to decide". *Civil Aeronautics Board* v. *Summerfield*, 74 S. Ct. 350, 354.

II. The Decision Below Is Neither Novel Nor Conflicting.

1) *The Ruling Is Not Unprecedented.* Petitioners maintain that the decision below is "unprecedented" and a "bold reversal" of a "well established and long standing construction" of Section 15 by the Maritime Board (Conf. Pet. 10; Bd. Pet. 18).

The requirement of prior Board approval or disapproval is established by *Isbrandtsen* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed, 336 U. S. 941. In that case, Isbrandtsen brought suit to "enjoin and set aside as much of the orders of the United States Maritime Commission approving conference agreements as authorized imposition by steamship carriers of contract and non-tract rates" (81 F. Supp. at 544). A three-judge statutory court declared in awarding the injunction:

> "We are all in agreement that a temporary injunction should issue to maintain the status quo pending further proceedings ['before the Commission'] to adjudicate the legality of the Conference agreements and the action contemplated pursuant thereto.
>
> * * *
>
> ". . . We should not at this stage pass on the validity of the agreements *before the Commission* in accordance with its established procedure, *has had an opportunity to pass thereon in an adversary proceeding.*" (81 F. Supp. 546).

This was a square holding that an exclusive patronage system could not be effectuated prior to agency approval and judicial review of such agency action. This Court dismissed the appeal from such ruling. 336 U. S. 941.

Petitioners have also overlooked *United States Navigation Co.* v. *Cunard S. S. Co.*, 50 F. 2d 83 (C. A. 2, 1931), aff'd. 284 U. S. 474, where the Court of Appeals (per A.

Hand, J.) said with reference to an identical dual rate system: "As the agreement set forth in the amended bill is alleged not to have been approved by the Board, it is ex vi termini unlawful" (50 F. 2d at 88). The Court added that "the failure to secure the approval of such an agreement" is "forbidden by the Shipping Act" and that the "Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has may order it filed and require the parties to cease from acting under it *unless and until its approval*" (*Ibid.* at 89). Petitioners have further conveniently by-passed *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, where this Court, citing Section 15, stated: "[T]he act requires that if any contract for a change of those rates is made the new rate may be charged only *after* the Board has approved the agreement" (300 U. S. at 146).

(2) *Board Practice In This Field Has Been Inconsistent.* The decisions of the Board in this field "have lacked uniformity and consistency; and, in such circumstances, administrative interpretations have little weight." *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 890 (S. D. N. Y. 1951), aff'd. 342 U. S. 950; see *American Surety Co.* v. *Bethlehem Nat. Bank*, 314 U. S. 314, 319. In *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922), the Shipping Board held that exclusive patronage systems were "unjustly discriminatory" and therefore unlawful Eleven years later, in *Rawleigh* v. *Stoomvart*, 1 U. S. S. B. 285, 290 (1933), the Board indicated that the *Eden* rule applied only to a single carrier and not to a conference agreement. In *Intercoastal Investigation*, 1 U. S. S. B. 400, 452 (1935), the Shipping Board Bureau rejected this distinction. Thereafter, in *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226-227 (1939), the Maritime Commission held that the *Eden* case applied to a conference agreement. More recently, the Board has taken the position that "under some circumstances and with some percentage differentials a dual rate system may be valid." F. M. B. Docket No. 724, *Contract Rates: North Atlantic Continental Freight*

Conference (Jan. 6, 1954). The contrariety of views concerning the inherent legality of the system itself has precluded the growth of a consistent, articulated Board policy concerning the timing of required approval. It follows that the decision below will not require "fundamental revision" in "long practice" (Bd. Pet. 28). Finally, even clear and consistent administrative practice must yield to "clear language" in a Congressional enactment. *Koshland* v. *Helvering*, 298 U. S. 441, 447.

(3) *There Is No. Conflict.* The Conference argues that there is a conflict between the ruling below and the decisions of this court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570. The *Cunard* and *Far East* cases decided that a complaint challenging validity of a dual rate system under the antitrust laws must be presented to the Board before judicial relief is invoked. The Board, in other words, is vested with "preliminary" or "primary original jurisdiction". 284 U. S. 485, 487.[14] But this proceeding is not an original suit under the antitrust laws in the District Court; it is a Petition for Review under the Shipping Act in the Court of Appeals (R. 1). Isbrandtsen preliminarily invoked the primary jurisdiction of the Board; it sought administrative relief in the first instance and it exhausted its administrative remedies.[15] Petitioners would invest the Board with "exclusive" jurisdiction, a result at war with Congressional intent as manifested by the Hobbs Act, *supra*. See Schwartz, *Legal Restriction of Competition In The Regulated Industries: An Abdication of Judicial Responsibility*, 67 Harv. L. Rev. 436 (1954); Jaffe, *Primary*

[14] See Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929 (1954).

[15] The Conference also claims a conflict (Conf. Pet. 15) with the decision in *S. S. W. Inc.* v. *Air Transport Association*, 191 F. 2d 658 (D. C. Cir., 1951). That case likewise held only that "Appellant must first seek relief from the Board", a course pursued by Isbrandtsen.

Jurisdiction Reconsidered. The Antitrust Laws, 102 Pa. L. Rev. 577 (1954).

The result below is in no way "anomalous" (Conf. Pet. 15). If a Conference files an application with the Board to institute an exclusive patronage system, the Board is required under Section 15 of the Shipping Act to approve or disapprove the application, and its decisions are reviewable in the Court of Appeals under the Hobbs Act, 5 U. S. C. § 1032. On the other hand, as this Court has explained, "if there be a failure to file an agreement as required by Section 15, the Board, as in the case of other violations of the Act, is fully authorized by Section 22, *supra,* (46 U. S. C. A. § 821), to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under Section 31 (46 U. S. C. A. § 830) [since superseded by the review provisions of the Hobbs Act, *supra*] for the first time, open to a judicial proceeding to enforce, suspend, or set them aside, in accordance generally with the rules and limitations announced by this Court." *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 486.

III. The Court of Appeals Had Jurisdiction to Set Aside the Board Order.

Petitioners challenge the jurisdiction of the Court of Appeals on grounds that the Board order was interlocutory and that the matter was committed to the exclusive discretion of the agency (Bd. Pet. 25-27; Conf. Pet. 18-21). In concluding that it was vested with jurisdiction, the Court of Appeals applied familiar principles to the circumstances of this case and its decision on this score scarcely warrants notice by this Court.

(1) *The Jurisdictional Issue Does Not Warrant Review.* The jurisdictional question has already been settled by this Court adversely to Petitioner's claim. In *Isbrandtsen* v. *United States,* 81 F. Supp. 544 (S. D. N. Y. 1948), a three-judge statutory court (per Rifkind, J.) enjoined effectuation of an exclusive patronage system until such time as the

Board had "an opportunity to pass thereon in an adversary proceeding." *Id.* at 546. An appeal from that judgment was dismissed by this court, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U. S. 941. Petitioners strive to distinguish that case on grounds that "the Board did not then assert the power to afford a party temporary relief against irreparable injury pending consideration of the tariff [*i.e.*, the exclusive patronage system] by the Board" (Conf. Pet. 16). But the want of power in the Board to award temporary relief would not have supplanted a statutory gap in the court's jurisdiction. Contrariwise, the assertion by the Board of power to grant temporary relief does not now divest the court of jurisdiction. Citing *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, the Court below said that reviewability "depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action" (R. 255). The Court emphasized that the Board order

> "attaches grave consequences to contractual and other business relations of Isbrandtsen. By denying Isbrandtsen's request to postpone operation of the dual rate system and to grant an immediate hearing, the Board virtually removed Isbrandtsen from the shipping market involved. Whether this removal was temporary or permanent Isbrandtsen would inevitably suffer 'real, immediate and incalculable' harm. The Board's action was just as determinative of Isbrandtsen's rights as it would have been had the Board specifically and affirmatively approved the dual rate system agreement in accordance with the statutory requirements * * *" (R. 256).[16]

[16] In granting the interlocutory injunction, the Court below pointed out that the exclusive patronage system threatened to compel Isbrandtsen to withdraw its ships from the trade, and that even if the system were subsequently held unlawful, Isbrandtsen "would have greatest difficulty in restoring its service because of the impossibility of recovering patronage from those shippers who would have signed such contracts and who would have made forward bookings based on such contracts covering a considerable period of time" (R. 242).

It is familiar learning that agency action which grants or denies a temporary privilege contingent upon further agency action may be immediately reviewable in some circumstances. Thus an order of the Federal Power Commission denying temporary authorization to construct a pipeline,[17] or a certificate of temporary authority to engage in transportation[18] are reviewable determinations. Respondents requests for postponement

> "should be regarded as carved out of the main proceeding and as partaking of the nature of a separate proceeding, in which the Commission was asked * * * to meet an emergency situation pending determination of what might be a protracted main proceeding. The Commission's order * * * finally disposed of that separate, substantive application, and hence we think the order was not 'merely preliminary or procedural' in character but had the necessary degree of finality to be immediately reviewable * * *." *Algonquin Gas Transmission Co.* v. *F. P. C.*, 201 F. 2d 334, 338 (C. A. 1st, 1953) (per Magruder, J.).

The Board order gave the Conference a green light to institute the system before a hearing. Review after a hearing at some indefinite future date would "be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546; see also *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327, 334.

(2) *The Court of Appeals Has Exclusive Jurisdiction.* In a brief dissenting opinion, Fahy, J., indicated below that if effectuation of the system were unlawful without prior Board approval, equitable relief might properly be sought

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[17] *Algonquin Gas Transmission Co.* v. *F. P. C.*, 201 F. 2d 334, 338 (C. A. 1st, 1953).

[18] *Braniff Airways* v. *Civil Aeronautics Board*, 147 F. 2d 152 (D. C. Cir. 1945); *Hudson River Day Line* v. *United States*, 85 F. Supp. 225 (S. D. N. Y. 1949).

against the Conference in the District Court (R. 260). But the Hobbs Act vests "exclusive" jurisdiction over Board orders in the Court of Appeals, 5 U. S. C. § 1032, and the Conference, in initiating the system, would purport to act under color of Board authority. Moreover, in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, this Court stated that in the event of "failure to file an agreement as required by Section 15" the appropriate remedy was a complaint to the Board pursuant to 46 U. S. C. § 821, followed by judicial review, p. 18, *supra*. That was precisely the procedure followed by Isbrandtsen in this case.

(3) *I. C. C. Practice Is Not Analogous.* The Board relies heavily upon those cases which hold that orders of the Interstate Commerce Commission, refusing to suspend rate orders are not reviewable (Bd. Pet. 25). But, as the Court below pointed out, "under the Interstate Commerce Act, rates are effective and lawful merely upon filing" (R. 258). Absent suspension, the carrier-made railroad rates are lawful subject to a post-operative commission veto. See *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 493 (E. D. Va., 1935). "In marked contrast", under the Shipping Act, "orders with respect to agreements [are] unlawful until approved" (R. 258). A statutory scheme which makes rates *lawful until disapproved* differs *toto coelo* from a statute which makes agreements *unlawful until approved.*

None of the decisions cited in the Conference petition derogate from the conclusion that the Board order here was reviewable. The ICC valuation order in *United States* v. *Los Angeles R. R.*, 273 U. S. 299 (cited Conf. Pet. 19) was held non-reviewable for the reason that it was "not a step in a pending proceeding" but "merely preparation for possible action in some [future] proceeding * * *". 273 U. S. at 310. Reliance by the Conference upon *Petroleum Co.* v. *Comm'n.*, 304 U. S. 209, and *Myers* v. *Bethlehem*, 303 U. S. 41, is curious, because in those cases plain-

tiffs sought to *enjoin* an investigation or hearing; here Isbrandtsen sought to compel the Board to *grant* a hearing before approval. The recent Court of Appeals decision in *Columbia Broadcasting System* v. *F. C. C.*, ... F. 2d ..... (D. C. Cir., March 11, 1954) (Conf. Pet. 31) is plainly not inconsistent. In that case, the Commission granted a construction permit and authority to make program tests to Station KBIG. The Commission thereafter refused to grant a CBS petition to enjoin the program testing pending hearing on KBIG's application for a license. The Court sustained this ruling on the grounds that the permits had been granted upon notice "and without objection" and that CBS had failed "to allege such economic injury as would warrant the immediate relief requested."[19]

(4) *The Finding Of Injury Had a Realistic Basis.* Petitioners also challenge as erroneous the finding of the Court of Appeals after hearing that Isbrandtsen would suffer "real, immediate, and incalculable harm" (R. 256), although the Board purported to make a contrary finding without a hearing (R. 221). Passing the fact that such a determination has traditionally been a judicial and not an administrative function, the jurisdiction of the Court of Appeals under the Hobbs Act to review agency orders does not depend upon irreparable injury; jurisdiction in such cases is conferred to protect persons who are "aggrieved". 5 U. S. C. § 1034. The Court's conclusion was fully warranted. Data filed by the Conference with the Board in support of its proposal to initiate the system showed that between June 1951 and September 1952, the Conference carried 69.7 percent of the cargo in this trade

[19] Conference reliance upon *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 515 (D. C. Cir., 1949) (Conf. Pet. 20) is likewise misplaced. Since the temporary mail rates, if excessive, would be retroactively lowered, thereby precluding the carriers from using the excess to subsidize their operations, there was no danger of injury to the petitioner.

(R. 132). The Board has acknowledged in other judicial proceedings that:

> "The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by members, collectively, of conferences which serve those trades. * * * If a contract system is wholly effective it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators." *Isbrandtsen* v. *United States*, 96 F. Supp. 883, 888 (S. D. N. Y. 1951), aff'd. 342 U. S. 950.

IV. Certiorari Should Not Be Granted at This Stage Because Proceedings Are Pending Before the Board.

One further factor, ignored by Petitioners, tends to militate against grant of the writ at this time. As the Court of Appeals noted, the "interlocutory injunction did not affect the Board's grant of a hearing after institution of a dual rate system agreement" (R. 254). Nor did the final decree interfere with the administrative hearing. Proceedings are now pending before the Board to determine if the exclusive patronage system proposed by the Japan-Atlantic Conference is lawful under the Shipping Act (F. M. B. Docket No. 730). Hearings have been concluded and briefs are scheduled to be filed with the Examiner on May 24, 1954. If the Board concludes that the proposed system is prohibited by statute, and if that determination is sustained on review, the Conference will have no grounds for protest. It would be irrelevant whether prior or subsequent approval were mandatory if the system were inherently defective.

CONCLUSION.

This case has been characterized throughout by unseemly haste on the part of the Petitioners. The Board sought to permit initiation of this system without even the shadow of a prior approval, not to mention the substance of a prior hearing. The Conference then vainly attempted to secure certiorari from this Court to review an interlocutory injunction while the hearings were proceeding in regular order before the Board. And now Petitioners seek review here while the hearings are approaching their conclusion before the Board. Petitioners thus seek to anticipate the construction of a full record on the basis of which this Court may fruitfully and intelligibly examine the regulatory scheme for the protection of shippers, carriers, and the public which Congress embodied in the Shipping Act of 1916.

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Interest of the Secretary of Agriculture	6
Argument	8
Conclusion	10
Appendix	11

CITATIONS

Cases and Statutes:	
Isbrandtsen Co. v. *United States*, 81 F. Supp. 544	9
Agricultural Marketing Act of 1946 (7 U. S. C. 1952 ed. § 1621 *et seq.*)	6
§ 1622 (j)	6
Hobbs Act (5 U. S. C. 1952 ed. § 1031 *et seq.*)	2, 3
Shipping Act, 1916 (39 Stat. 728, as amended, 46 U. S. C. 1952 ed. § 801 *et seq.*)	3
§ 14	3
§ 15	3, 6, 8, 9
28 U. S. C. 1952 ed. § 1254 (1)	2
Miscellaneous:	
Commercial Statistics; Water-Borne Commerce of the United States for the Calendar Year 1951, Annual Report of the Chief of Engineers, 1952	7
H. R. Doc. No. 805, 63d Cong., 2d Sess	8

299899—54——1